No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table of Authorities ii

A. A State may not criminalize the assertion of a constitutional right. 3

1. Laws that criminalize the assertion of constitutional rights are per se unconstitutional 3

2. North Dakota's law also is invalid if subjected to unconstitutional conditions analysis. 12

B. Criminal test-refusal statutes are less effective than other approaches in combating impaired driving. 14

Conclusion 22

TABLE OF AUTHORITIES

Cases

Branti v. *Finkel*,
445 U.S. 507 (1980) 6, 9

Burns v. *State*,
807 S.W.2d 878 (Tex. App. 1991) 18

Carter v. *Cty. of San Bernardino*,
No. E044840, 2009 WL 1816658
(Cal. Ct. App. June 25, 2009) 18

Connick v. *Myers*,
461 U.S. 138 (1983) 6

Dolan v. *City of Tigard*,
512 U.S. 374 (1994) 9

Frost & Frost Trucking Co. v. *R.R. Comm'n*,
271 U.S. 583 (1926) 9

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) 5, 9

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 9

Mackey v. *Montrym*,
443 U.S. 1 (1979) 9, 10

McCann v. *State*,
588 A.2d 1100 (Del. 1991) 18

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Nat'l. Treasury Emp. Union v. *Von Raab*,
489 U.S. 656 (1989) 8

New Jersey v. *Portash*,
440 U.S. 450 (1979) 12

Cases—continued

NFIB v. *Sebelius*,
132 S. Ct. 2566 (2012) 9

Nollan v. *California Coastal Comm'n*,
483 U.S. 825 (1987) 9

People v. *Rossetti*,
179 Cal. Rptr. 3d 148 (Cal. Ct. App. 2014) 18

Perry v. *Sinderman*,
408 U.S. 593 (1972) 6

Pickering v. *Bd. of Educ.*,
391 U.S. 563 (1968) 9

Rust v. *Sullivan*,
500 U.S. 173 (1991) 9

Rutan v. *Republican Party of Illinois*,
497 U.S. 62 (1990) 6, 9

Samson v. *California*,
547 U.S. 843 (2006) 8

Schmerber v. *California*,
384 U.S. 757 (1966) 10

South Dakota v. *Dole*,
483 U.S. 203 (1987) 9, 12

South Dakota v. *Neville*,
459 U.S. 553 (1983) 10

Speiser v. *Randall*,
357 U.S. 513 (1958) 6

State v. *Barth*,
637 N.W.2d 369 (N.D. 2001) 20

State v. *Conlin*,
No. A14-0069, 2014 WL 7011171
(Minn. Ct. App. Dec. 15, 2014) 20

Cases—continued

State v. *Krause*,
484 N.W.2d 347 (Wis. Ct. App. 1992) 18

State v. *Lanier*,
452 N.W.2d 144 (S.D. 1990) 18

State v. *Mason*,
No. 02C-01-9310-CC-00233, 1996 WL
111200 (Tenn. Crim. App. Mar. 14, 1996) 18

State v. *Ravotto*,
777 A.2d 301 (N.J. 2001) 18

State v. *Worthington*,
65 P.3d 211 (Idaho Ct. App. 2002) 18

Stephenson v. *Binford*,
287 U.S. 251 (1932) 9

Thai Ngoc Nguyen v. *State*,
292 S.W.3d 671 (Tex. Crim. App. 2009) 18

United States v. *Bullock*,
71 F.3d 171 (5th Cir. 1995) 18

Vernonia Sch. Dist. 47J v. *Acton*,
515 U.S. 646 (1995) 8

Wyman v. *James*,
400 U.S. 309 (1971) 5, 8

Statutes

Minn. Stat. Ann. § 609.50 20

N.D. Cent. Code

§ 12.1-08-02 20

§ 12.1-32-01(5) 12

§ 39-06.1-10 21

§ 39-20-04.1 21

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REPLY BRIEF FOR PETITIONER

The briefs filed by respondents and the United States reveal some degree of agreement between the parties. The United States and North Dakota evidently recognize that, absent "implied consent," the Fourth Amendment precludes a State from requiring a driver to submit to a blood test in the absence of a warrant. For the reasons we explained in our opening briefs, we agree. And we assume that the United States and North Dakota also would acknowledge that, if the Fourth Amendment does not permit a State to physically force a driver to submit to an unwarranted search, the Constitution makes it impermissible for the State to *criminalize* the driver's refusal to submit to the search—that is, to make it a crime for a person to assert his or her right to resist an unconstitutional search.[1]

Accordingly, the dispositive question here is whether a State may insist on the implied surrender of a constitutional right in return for a state-provided benefit—and whether it may impose *criminal* penalties on the subsequent assertion of that right by the recipient of the benefit. The United States and North Dakota answer that question by asserting that a State may *deem* individuals to have irrevocably surrendered

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[1] Although North Dakota acknowledges that "a chemical test is a search under the Fourth Amendment and, accordingly, may not be taken without a warrant unless an exception to that requirement applies," it labels that principle "irrelevant" here because "[n]o search occurred." N.D. Br. 19, 20. This peculiar argument, which is not endorsed by the United States, is plainly wrong. Attaching a criminal punishment to the exercise of a constitutional right violates that right, as the Court clearly held in *Camara*, *See*, and *Patel*.

their constitutional rights in return for a state benefit (here, permission to drive) and may enforce that required surrender of constitutional rights through the imposition of criminal penalties, so long as doing so is "reasonable" or satisfies some sort of vague balancing test—even if, as in this case, the defendant was *unaware* that his receipt of the benefit surrendered the constitutional right. But as this Court held in *Patel* and *Camara*, that is simply wrong. The Court has never endorsed rules that make the assertion of constitutional rights illegal, and doing so now would work a radical and dangerous expansion of state authority.

In fact, the governing principle is straightforward and long-settled. When the government imposes criminal sanctions on behavior (here, petitioner's refusal to permit a search), the question is whether the government's act is consistent with the applicable substantive constitutional rule (here, the general prohibition on searches absent a warrant). If it is not, imposition of the criminal sanctions is unconstitutional. When the government instead seeks simply to withdraw or withhold a benefit that it had no obligation to provide because the recipient failed to satisfy a state-imposed condition on receipt of the benefit, the very different question presented is whether enforcement of the condition impermissibly burdens a constitutional right. In no event, however, may the government attach criminal penalties to conduct that is protected by the Constitution.

A. A State may not criminalize the assertion of a constitutional right.

1. Laws that criminalize the assertion of constitutional rights are per se unconstitutional.

a. The question whether a State may require or prohibit specific private conduct on pain of criminal penalties (*e.g.*, may require submission to a search, suppress speech, demand the surrender of property without payment of just compensation) has always been understood to turn on whether the relevant provision of the Constitution permits the State to engage in those acts as a substantive matter. If the government may not engage in those acts consistent with the Constitution, imposing penalties on persons who refuse to allow the government to do what it wants to do (or who themselves refuse to do what the government demands that they do) is facially unconstitutional. The government may not put persons in prison for refusing to hand over their property without just compensation; for saying disagreeable things about the President; or for resisting an unwarranted search in circumstances where the Fourth Amendment requires a warrant.

Although that proposition would seem so fundamental as not to require proof, it is in fact the holding of *Patel*, *Camara*, and *See*. As we showed in our opening *Birchfield* brief (at 30-32), in each of those cases the State sought to impose criminal penalties as punishment for refusal to submit to a search; in each, the Court looked to the substance of the Fourth Amendment to determine whether the proposed search was permissible; and in each the Court, upon finding the search inconsistent with the Fourth Amendment, held the imposition of criminal penalties for search refusal to be unconstitutional.

The efforts of North Dakota and the United States to distinguish these decisions are mystifying. North Dakota asserts that *Patel* and *Camara* "by their terms[] do not apply here because [petitioner] was not searched." N.D. Br. 37. But the whole point of the holdings in *Patel* and *Camara* is that the defendants in those cases *also* were not searched; just like petitioner here, they instead faced punishment because they *resisted* unconstitutional searches.

As for the United States, it maintains that *Patel* and *Camara* are inapposite because "[n]either case suggested that the inspection schemes at issue were constitutionally valid, but could be enforced only through civil means." U.S. Br. 25 n.4. But that observation surely is wrong; although the Court held in *Patel* that criminal inspection-refusal penalties were unconstitutional, there is no reason to doubt that hoteliers in Los Angeles could lose their licenses for refusing to comply with the inspection requirements (that is, by enforcement "through civil means"). The government's submission also is beside the point. The Court held in *Patel* that business owners simply may not "reasonably be put to this kind of choice" between submitting to an unconstitutional search and facing criminal punishment (135 S. Ct. at 2452)—the very choice facing petitioner here.

That principle governs in this case. For reasons we explained in some detail in our opening *Birchfield* brief (at 12-20), a compelled search without a warrant in the circumstances of this case would be unconstitutional. The United States nevertheless suggests that searches conducted as an element of an "implied-consent obligation[]" are "reasonable under the Fourth Amendment." U.S. Br. 21. This contention is baseless; the government makes no effort to demonstrate that a warrant-

less search in these circumstances comports with the usual Fourth Amendment standards, and it is tellingly unable to cite a single Fourth Amendment decision upholding imposition of criminal penalties in such a case. In fact, the government's contention is inconsistent with the entire tenor of this Court's Fourth Amendment doctrine and flatly irreconcilable with the holding of *McNeely*.

b. The United States and North Dakota cannot escape the per se rule that it is unconstitutional to criminalize the exercise of a constitutional right through the slight-of-hand of conditioning receipt of a government benefit on waiver of a constitutional right, and then criminalizing failure to satisfy that condition.

Of course, the State may, in some circumstances, attach a condition to the award of a benefit; it may be able to require that, if individuals seek a particular benefit from the State, they must abide by the associated conditions, even (sometimes) if those conditions bear to some degree on the exercise of a constitutional right. This sort of exchange is the focus of the Court's unconstitutional conditions decisions. Under those holdings, a State may, for example, permissibly condition government financial aid on the recipient's allowance of home visits by welfare officials, or condition state employment on the employee refraining from certain forms of disruptive speech. See, *e.g.*, *Wyman* v. *James*, 400 U.S. 309 (1971); *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). But in those cases, the corollary to the exchange is that, if the individual does not satisfy the condition, he or she simply does not get (or loses) the benefit. That is the extent of the State's power; the Court has never said that a State may go further and attach an affirmative penalty—let alone a criminal penalty—to failure to satisfy the State's condition.

That limitation on state authority is inherent in the nature of the unconstitutional conditions doctrine. Although the government may have no obligation to provide particular benefits, the Court has held that the government may not attach a condition to the award of benefits that would effectively "coerce" surrender of a constitutional right. *Branti* v. *Finkel*, 445 U.S. 507, 513 (1980). As we show in the opening *Birchfield* brief (at 33-34), the Court's consistent concern in these cases has been that the State's manipulation of benefits and conditions in this manner would effectively "allow the government to 'produce a result which [it] could not command directly.'" *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). See, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 72 (1990). Accordingly, the unconstitutional conditions cases are ones where the Court is trying to determine whether the State seeks to do indirectly (by attaching a condition to the award of a benefit) something the Constitution prohibits it from doing by fiat.

In this case, there is no need to go though that analysis to determine whether the State is trying to achieve a forbidden goal by indirection. Here, the government is *directly* doing the forbidden thing, not by taking away something it did not have to give in the first place (as in, for example, the public employment or welfare examples), but by expressly criminalizing the exercise of a constitutional right. It would be just as though the State provided that public employees who spoke in a disapproved manner on matters of private concern not only could lose their government jobs (see, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983)), but could be put in prison for speaking in a manner inconsistent with the State's employment condition. There can be no serious contention that imposition of

such a criminal punishment on speech would be constitutional.

The United States seeks to circumvent this principle by contending that, if the government may require drivers to submit to blood tests as a condition on their ability to drive, it may use criminal penalties to "enforce" that requirement. U.S. Br. 16-17. But at least in the circumstances of this case, that argument is a transparent form of bootstrapping. There is no suggestion here that, when petitioner got behind the wheel, he actually consented to—or even was aware of—the condition attached by the State to his ability to drive. That is why the United States and North Dakota characterize the challenged statutes as "*implied*-consent rules." U.S. Br. 16 (emphasis added). The United States' contention therefore is that, although the Fourth Amendment prohibits the unwarranted blood testing of drivers as a general matter, the State may effectively read that substantive constitutional limit on state authority off the books by purporting to criminally punish, not the exercise of Fourth Amendment rights as such, but the failure to abide by the driver's "implied consent" to be tested. That theory, if accepted, would be a formula for the destruction of constitutional guarantees.

c. None of the decisions relied upon by the United States and North Dakota supports their contention that a State may criminalize the assertion of a constitutional right, in circumstances where the State has purported to make surrender of that right a condition on the award of a benefit. Insofar as they are relevant here at all, each of the cited decisions falls into one of two categories: (a) it addresses the substantive scope of the Fourth Amendment; or (b) it addresses the circumstances in which the government may withhold

or withdraw benefits for failure to satisfy the State's condition. None suggests that a State may affirmatively punish assertion of a constitutional right in any circumstance.

First, the United States maintains that the Court has "upheld search-related conditions on persons who receive particular benefits when the conditions were supported by a balancing of interests." U.S. Br. 21. But none of the cited decisions involved the validity of a "condition"; each addressed the substantive scope of the Fourth Amendment, considering whether a proposed search could validly be executed. It was in this context that the Court engaged in an inquiry into "reasonableness," as it does in all Fourth Amendment cases. See *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653-54 (1995) (search permissible under special needs exception to warrant requirement); *Nat'l. Treasury Emp. Union* v. *Von Raab*, 489 U.S. 656, 666 (1989) (same); *Samson* v. *California*, 547 U.S. 843, 847 (2006) (search permissible given parolee's limited expectation of privacy); see also *Wyman*, 400 U.S. at 386 ("we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term" because there was no "search in the traditional criminal law context"). And here, it is undisputed that ordinary Fourth Amendment principles preclude a search in the absence of a warrant.

Second, the remaining decisions cited by the United States and North Dakota are unconstitutional conditions cases of the conventional sort. These addressed whether conditions that bore in some respect on the exercise of constitutional rights could be attached to the award or withdrawal of government benefits of various sorts (public employment, grants, subsidies,

land use permits). In some of these cases the Court upheld the condition; in others it found the condition invalid because the requirement had the practical effect of impeding the exercise of a constitutional right. But in *no* case did the State purport to attach an independent penalty beyond denial of a benefit that the State was under no obligation to provide—let alone a criminal penalty—to the recipient's failure to satisfy a condition.[2]

That is true, as well, of the driving cases on which the United States places principal reliance. U.S. Br. 18-20. In *NcNeely*, the Court noted implied-consent laws that "impose significant consequences when a motorist withdraws consent," among them that "the motorist's driver's license is immediately suspended or revoked." 133 S. Ct. at 1566. That penalty is limited to the revocation of a benefit; it does not purport to attach a criminal penalty to the exercise of a constitutional right. Similarly, in *Mackey* v. *Montrym*, 443 U.S. 1 (1979), the Court rejected a due process challenge to a state law that summarily suspended the licenses of

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[2] This was so in public employment First Amendment cases, see *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006); *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 63 (1990); *Branti v. Frankel*, 445 U.S. 507, 518 (1980); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968); in Fifth Amendment takings cases, see *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); *Dolan* v. *City of Tigard*, 512 U.S. 374, 377 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); in funding cases, see *Rust* v. *Sullivan*, 500 U.S. 173, 178, 196 (1991); in federalism-related cases, see *Nat'l Fed'n of Indep. Businesses* v. *Sebelius*, 132 S. Ct. 2566, 2608 (2012); *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987); and in cases implicating public roads, see *Stephenson* v. *Binford*, 287 U.S. 251, 260 (1932); *Frost & Frost Trucking Co.* v. *R.R. Comm'n*, 271 U.S. 583, 593 (1926).

drivers who refused a chemical test; that law, too, was limited to license suspension and did not impose affirmative penalties for test refusal. See *id.* at 3-4.

Third, the only decision relied upon by the United States and North Dakota that does not fall into one of these categories is *South Dakota* v. *Neville*, 459 U.S. 553 (1983), which held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DUI prosecution. U.S. Br. 17-18; N.D. Br. 23-24. See also *McNeely*, 133 S. Ct. at 1566 (noting such state statutes and *Neville*'s holding that allowing use of an adverse inference from test refusal "does not violate the Fifth Amendment"). But as we showed in our opening *Birchfield* brief (at 23-24, 40 n.11), *Neville* has no application here at all.

As the Court held in *Schmerber* v. *California*, 384 U.S. 757, 762 (1966), the Fifth Amendment does not prohibit a State from "forc[ing] a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville*, 459 U.S. at 559. That being so, "the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." *Id.* at 563. *Neville* therefore was not an unconstitutional conditions case, not one where the State criminalized (or otherwise penalized) the assertion of a constitutional right, and not one "where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." *Id.* at 563-564. *Neville* accordingly provides no support for the position of the United States and North Dakota here. Although we made this point in our opening brief, the United States and North Dakota offer no response.

d. Applying this framework to our case, if the government withdraws a benefit because the recipient refused to allow a search—*i.e.*, suspends a driver's license—the issue is one of unconstitutional conditions, as to which it would be appropriate to apply the usual unconstitutional conditions inquiry, perhaps including an examination into nexus and proportionality. See *Birchfield* Opening Br. 33-40. But when, as here, the government seeks to enforce its desire to search by means of the criminal law, there is no issue of withdrawal of a benefit, and the case is governed by the substantive Fourth Amendment inquiry: whether, in the circumstances, the State may compel a warrantless search by force or by threatening a criminal sanction. The answer to that question turns on whether the State had a right to search under the Fourth Amendment without a warrant in the first place, not on application of an unconstitutional conditions balancing test. And as we have explained, North Dakota and the United States essentially concede that—barring application of a special "implied-consent" rule—a warrantless search is not permissible in the circumstances of this case. That should be the end of the matter.

But there is more. It bears emphasis that the contrary rule advanced by the United States and North Dakota has extraordinary implications. It would allow the government to attach criminal penalties to an individual's exercise of a constitutional right that is inconsistent with conditions attached to workaday benefits offered by the government—even when, as in this case, there is no showing that the individual was aware of either the condition or the penalty. As a consequence, the State's contention here, if accepted, would fundamentally alter the unconstitutional conditions doctrine, for the first time using that doctrine to undercut, rather than protect, the constitutional

right at issue. The Court should resist the invitation to take that step.

2. North Dakota's law also is invalid if subjected to unconstitutional conditions analysis.

a. In addition, even if it is not per se unconstitutional for a State to attach criminal penalties to the assertion of a constitutional right in the circumstances of this case, the penalties applied here would violate the unconstitutional conditions doctrine. As we explained in our opening brief, denial of the ability to drive is itself coercive, and even if that were not so, adding the threat of criminal penalties is "the essence of coerc[ion]." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). This combination of penalties reaches the point where "pressure turns into compulsion" within the meaning of the unconstitutional conditions doctrine. *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987). See *Birchfield* Opening Br. 35-36.

In contending to the contrary, North Dakota minimizes the magnitude of the compelled-consent criminal penalty, maintaining that most test-refusal convictions are misdemeanors. N.D. Br. 54. But test refusal may be a felony; the petitioner in *Bernard* faces a minimum of three and a maximum of seven years in prison, as well as a fine of up to $14,000. See *Bernard* Opening Br. 7. And misdemeanor penalties in North Dakota may themselves be severe, including up to a year in prison, fines of up $3000 (N.D. Cent. Code § 12.1-32-01(5)), and a possible range serious collateral consequences, including in some circumstances ineligibility for virtually any profession requiring a license (see, *e.g.*, § 15.1-13-25 (teacher), § 27-11-03.1 (lawyer)) or to adopt a child (§ 50-12-03.2). This takes coercion to a level far removed from that present in the run of civil unconstitutional conditions cases.

For its part, the United States maintains that, once it is agreed that a condition is valid, a State may use any mechanism it wants to enforce the condition; here, the United States continues, the condition is submission to a search. U.S. Br. 25. But even assuming that the relevant "condition" in this case is simply agreeing to be searched, the government assumes its conclusion in asserting that *any* enforcement mechanism is acceptable.

In fact, there is no decision of this Court so holding, because there is no other case addressing laws in which States have used criminal penalties to enforce implied-consent conditions on the award of state benefits. Accordingly, the Court has never had occasion to say that criminal penalties may be used to enforce such a condition (in fact, we believe that it has said in *Patel*, *Camara*, and *See* that they may *not* be so used). The government's argument that States may use criminal penalties to enforce conditions on the award of benefits therefore is trying to expand the government's (occasional authority to withdraw a benefit into the very different power to override constitutional guarantees. For the reasons we already have explained, such an approach is impermissible. See page 7, *supra*.

b. Moreover, the United States also is wrong in the second part of its syllogism: the relevant "condition" in this case is not limited to surrender of the right to resist a search, but also must be understood to include exposure to criminal penalties for refusal to surrender the right. The State ordinarily does not have the authority to impose criminal penalties for the exercise of a constitutional right. If the State ever may apply such penalties to failure to satisfy a condition, that is only because exposure to the criminal penalty is part of the condition to which the recipient subjected him- or

herself in return for receiving the relevant benefit from the State. That means the criminal penalty must be understood to be *part of the condition* for purposes of the unconstitutional conditions analysis.

And for reasons we state in our opening brief (at 38-39), there is only an attenuated nexus, and no proportionality, between the condition of submission to criminal test-refusal penalties and the benefit of being permitted to drive. The government's response is that criminal test-refusal penalties are effective at addressing impaired driving and that alternative approaches are not. But we showed in our opening brief (at 40-46), and demonstrate further below (at 14-21), that the government's assertion on these points is incorrect.

B. Criminal test-refusal statutes are less effective than other approaches in combating impaired driving.

The United States and North Dakota devote much attention to describing the magnitude of the Nation's impaired driving problem and contending that criminal compelled-consent laws are a necessary response to that problem. See U.S. Br. 2-9, 26-31; N.D. Br. 1-10, 39-48. We agree with the first element of this presentation; there is no denying that impaired driving is enormously destructive, and that States must be permitted to develop and implement effective responses to that problem. But we take issue with their proposed solution. In fact, criminal compelled-consent statutes are not effective at obtaining BAC evidence. And numerous other constitutional methods that are readily available to the state and federal governments—including, notably, the use of search warrants—are much *more* effective in combating impaired driving.

1. To begin with, criminal refusal statutes are not the panacea suggested by the United Stats and North Dakota. On the face of it, such statutes hardly could be indispensable tools in the fight against drunk driving; after all, a very substantial majority of the States have declined to enact criminal test-refusal statutes of the sort at issue here. On examination, it is not hard to see why that is so. For all the United States has to say in its brief about the inadequacy of "purely administrative sanctions" and the need for BAC evidence (U.S. Br. 26), its presentation, and that of North Dakota, is notably lacking in *any* evidence that criminal test-refusal statutes actually lead to a material increase in either BAC testing or DUI/DWI convictions. In fact, they do not.

To begin with, as we showed in our opening brief, a NHTSA review found that the available data "did not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions*, DOT HS 811 551, at i (2012), perma.cc/-LN5Q-K85Z. The United States makes no response.[3]

As for criminal test-refusal statutes in particular, the *amicus* brief submitted by the National College for DUI Defense (NCDD) and NACDL demonstrates in

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[3] North Dakota points to a study finding that sites "with the highest conviction rates" had criminalized refusal. N.D. Br. 45. But the cited study "re-define[d] a conviction of DWI as a criminal conviction of impaired driving *or as a conviction of test refusal*, or both." NHTSA, *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions* 15 (2012) (emphasis added). Although test refusal statutes surely lead to more convictions *for test refusal*, the study does not show that such statutes lead to more DUI/DWI convictions.

some detail that there is no substantial correlation between test refusal rates and criminalization of test refusal; to offer just one example, Florida, the State with the third highest refusal rate in the Nation, has a criminal test refusal statute. See NCDD Br. 3-6.

In this regard, North Dakota's description of its experience is particularly misleading. It suggests that the enactment of "Brielle's law" led to a dramatic decline in the number of crashes resulting in fatalities that were alcohol related, from 51% in 2012 to 41% in 2015, "the lowest rate in more than a decade." N.D. Br. 9-10. In fact, the alcohol-related death rate had been lower in some years prior to the enactment of Brielle's law (it was 40% in 2009), and was lower in 2005 (45.5%), 2006 (42.3%), and 2009 than in 2014 (46.7%), the year after enactment of the law. Safety Division, *Annual Report: Fiscal Year 2015*, N.D. Department of Transportation 16 (2015), perma.cc/9KDJ-RTP3. In addition, to the extent that the law did have a positive effect, there is no reason to attribute that result to the criminalization of test refusal rather than to the numerous other provisions included in the legislation.

2. In contrast to the questionable value of criminal test-refusal statutes, there is substantial evidence that pursuing search warrants is effective in obtaining both BAC evidence and DUI/DWI convictions.

First, as we showed in our opening brief (at 42-44), and as *amici* NCDD and NACDL demonstrate in detail (at Br. 6-18), in the vast majority of jurisdictions police officers may obtain such warrants remotely and quickly in DUI cases. Although the United States refers vaguely to the "delay" occasioned by seeking a warrant (U.S. Br. 28), neither it nor North Dakota denies that the modern procedures described by this

Court in *McNeely* (see 133 S. Ct. at 1562) make warrants easily available to officers in a timely fashion.

Second, warrants are very effective in obtaining BAC evidence—probably much more so than are criminal compelled-consent statutes.

One of the most extensive studies of the issue analyzed the experience of four states (Arizona, Michigan, Oregon, and Utah) that require warrants before DUI/DWI blood tests in some or all of their jurisdictions. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* (2007). As it found:

> Judges and prosecutors interviewed strongly supported warrants, to the extent of volunteering to answer the telephone in the middle of the night to issue a warrant. They agreed that warrants have reduced breath test refusals and increased the proportion of DWI cases with BAC evidence in their jurisdictions. This in turn has produced more guilty pleas, fewer trials, and more convictions.

Id. at vi. A Phoenix police officer quoted in the survey "estimated that refusals dropped from about 30 to 40% before warrants were used to 5% or less afterwards." *Id.* at 10. Thus, as the plurality noted in *McNeely*, "field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence." *McNeely*, 133 S. Ct. at 1567 (plurality opinion).

Third, the findings that issuance of warrants greatly reduces test refusals belies the argument that reliance on warrants often will require forcible blood

draws that produce violent confrontations between suspects and law enforcement personnel. See U.S. Br. 28-29; N.D. Br. 29.[4] To the contrary, a controlled experiment by NHTSA that compared counties in North Carolina requiring warrants in the vast majority of cases with counties that did not found that, in the counties that required warrants, "fewer cases were pled down to lesser charges; defendants more often pled guilty; more DWI convictions were obtained; fewer cases went to trial; more cases were disposed; and [officers] believed that court time was reduced." NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* vi (2011). In

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[4] The United States' assertion that "[e]xperience demonstrates that the risk of such confrontations is far from theoretical" (U.S. Br. 28) is quite misleading. In fact, *none* of the ten decisions cited in support of that contention involved a DUI/DWI case in which a warrant had been obtained. Nine involved *warrantless* blood draws and therefore are wholly inapposite here. See *People* v. *Rossetti*, 179 Cal. Rptr. 3d 148, 150 (Cal. Ct. App. 2014); *Carter* v. *Cty. of San Bernardino*, No. E044840, 2009 WL 1816658, at *2 (Cal. Ct. App. June 25, 2009); *McCann* v. *State*, 588 A.2d 1100, 1101 (Del. 1991); *State* v. *Worthington*, 65 P.3d 211, 213 (Idaho Ct. App. 2002); *State* v. *Ravotto*, 777 A.2d 301, 304 (N.J. 2001); *State* v. *Lanier*, 452 N.W.2d 144, 145 (S.D. 1990), abrogated by *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013); *State* v. *Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200, at *8 (Tenn. Crim. App. Mar. 14, 1996); *Burns* v. *State*, 807 S.W.2d 878, 880 (Tex. App. 1991), abrogated by *Thai Ngoc Nguyen* v. *State*, 292 S.W.3d 671 (Tex. Crim. App. 2009); *State* v. *Krause*, 484 N.W.2d 347, 349 (Wis. Ct. App. 1992). The tenth, and the only case where law enforcement personnel received a warrant, involved an armed robbery suspect who was not intoxicated. *United States* v. *Bullock*, 71 F.3d 171, 174 (5th Cir. 1995).

all, police officers stated that "obtaining warrants for blood was a valuable tool for collecting evidence." *Ibid.*[5]

These findings also call into doubt North Dakota's contention that use of warrants poses a "particularly grave risk of danger to law enforcement officers in rural parts of North Dakota." N.D. Br. 29. The North Carolina test program was effective even in sparsely populated areas like Duplin County.[6] Although law enforcement personnel in Duplin County occasionally had "arguments" with suspects over the use warrants, as did "their counterparts in other counties," "[t]here were no reports from the sheriff's office, highway patrol, or phlebotomy staff of combative suspects or safety issues." NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* 15 (2011). Overall, "[t]he refusal rate for the experimental counties was 18% in 2004, dropping to 12% by 2006. During the same time, the refusal rate for the comparison counties rose from 19% to 20%." *Id.* at vii.

Fourth, insofar as enforcing a warrant nevertheless is thought to require the use of force or otherwise to be problematic, States could impose criminal *warrant*-refusal penalties, just as they now impose criminal *test*-refusal penalties. Such prosecutions appear possible in both North Dakota and Minnesota under

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[5] The United States refers to this study in describing the slight additional time required to issue a warrant, but fails to mention the finding that that police officers found the warrant process worthwhile. U.S. Br. 9.

[6] Duplin County has been described as "an expanse of bare fields in winter, small towns, and more fields." Bruce Henderson, *NC Hog Farm Neighbors Seek Court Help To Stop the Stink*, Charlotte Observer (Jan. 1, 2015), perma.cc/94UD-XLYZ.

existing law.[7] Such an approach would achieve all the benefits that the United States and North Dakota perceive in the current criminal test-refusal regime—but would lack the constitutional infirmity.

3. In addition, as we showed in our opening brief (at 44-46), North Dakota underutilizes other available alternative approaches that comport with the Constitution and that are demonstrably effective. The only real response to this showing that is offered by the United States and North Dakota is the assertion that many of the alternative strategies "depend on BAC evidence for appropriate implementation." U.S. Br. 30. In fact, even apart from the reality that criminal test-refusal penalties often do not themselves produce BAC evidence, most of the available approaches do *not* require BAC evidence, including the first ten on the NHTSA chart: (1) high-visibility sobriety checkpoints; (2) alcohol problem assessment and treatment; (3) alcohol interlocks; (4) alcohol screening and intervention; (5) minimum drinking-age laws; (6) high-visibility saturation patrols; (7) passive alcohol sensors; (8) DWI courts; (9) limits on diversion and plea agreements; and (10) DWI offender monitoring. Nat'l Highway Traffic Safety Admin., *Countermeasures that Work: A Highway Safety Countermeasures Guide for*

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[7] See Minn. Stat. Ann. § 609.50 (obstruction of legal process); N.D. Cent. Code § 12.1-08-02 (resistance to the discharge of official duties); see also *State* v. *Conlin*, No. A14-0069, 2014 WL 7011171, at *1 (Minn. Ct. App. Dec. 15, 2014); *State* v. *Barth*, 637 N.W.2d 369, 375 (N.D. 2001).

State Highway Safety Offices, DOT HS 811 727 at 1-7 through 1-8 (7th ed. 2013), perma.cc/C5N3-LQJ6.[8]

Moreover, North Dakota does not fully enforce DUI laws already on the books, a point noted during the debate on its current statute. See Legislative History of H.B. 1302 at 10, perma.cc/3P8Z-TAPN. Enforcing those laws, pursuing additional approaches such as passive alcohol sensors—described by the North Dakota Attorney General's Office during the debate as producing "fast, reliable, accurate results" (*id.* at 302)—and addressing North Dakota's problematic culture of binge drinking (also frequently referenced in the debate on the State's law), offer the State a variety of mechanisms with which to combat impaired driving.

In saying this, we of course do not mean to suggest that States "are required to select a single strategy" to address impaired driving. U.S. Br. 30. We contend, instead, that States may *not* select the single strategy that is flatly inconsistent with the requirements of the Fourth Amendment. Because that is what North Dakota has done, the decision below upholding the State's criminal compelled-consent law should be set aside.

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[8] North Dakota asserts that petitioner "incorrectly faults North Dakota for providing enhanced penalties only to those offenders with a BAC of 0.18% or higher, rather than 0.16%." N.D. Br. 46. In fact, full DWI penalties—such as license suspension—are applicable only at 0.18%. See N.D. Cent. Code § 39-06.1-10; N.D. Cent. Code § 39-20-04.1. For this reason, the Governors Highway Safety Association classifies North Dakota's "Inc[reased] Penalty for High BAC" as beginning at "0.18." Governors Highway Safety Ass'n, *Drunk Driving Laws*, (Mar. 2016), perma.cc/GC9R-M6QD.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted.

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